SOVEREIGN GENERAL INSURANCE SDN. BHD. v. KOH TIAN BEE

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Seah S.C. JJ.), June 17 and 18, 1986 & October 27, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 148 of 1985]

Bankruptcy – Creditor's petition – Application to strike out – Act of bankruptcy – Bankruptcy Act 1967, s. 3(1).

In this case the appellant had obtained judgment against the respondent in the sum of $360,749.46 with costs and interest at 6% per annum of $100,000.00 only. The respondent failed to satisfy the judgment. The appellant applied for leave to levy execution on the respondent's shares in a company and these shares were eventually charged and issued to the sheriff to satisfy the judgment. The shares were subsequently sold and the proceeds of sale amounting to $75,000.00 were paid to the appellant to set off the judgment debt. Subsequently, a bankruptcy notice was issued and as the notice could not be served on the respondent, substituted service was allowed by advertisement in the papers. The respondent failed to comply with the notice. The appellant took out the creditors' petition. The respondent gave notice of his intention to oppose the petition. The learned trial judge, after hearing the parties, struck off the petition with costs. The appellant appealed.

Held, allowing the appeal: (1) in the exercise of his jurisdiction in bankruptcy proceedings, the learned judge cannot go behind the judgment. Nor is it open to the learned judge to strike out the creditors' petition by disputing the validity of the orders made in earlier execution proceedings when the orders have not been set aside;

(2) the respondent gave notice of intention to oppose the petition but make no mention of any irregularity. In this case, it could not be said that the bankruptcy notice was irregular and invalid and the respondent had not committed an act of bankruptcy within the meaning of section 3(1)(c) of the Bankruptcy Act 1967 entitling the petitioning creditors to petition herein.

Cases referred to:

(1) *Kamaruddin* v. *United Motor Works Pte. Ltd.* [1982] 1 M.L.J. 126.
(2) *In re Easton* (1893) 10 Mor. 111; 9 T.L.R. 409.
(3) *Isaacs* v. *Robertson* [1984] 3 All E.R. 140, 143.
(4) *Marsh* v. *Marsh* [1945] A.C. 271.
(5) *MacFoy* v. *United Africa Co. Ltd.* [1962] A.C. 152.
(6) *Re Beauchamp* [1904] 1 K.B. 572.
(7) *Re Flatau* (1889) 22 Q.B.D. 83.
(8) *Re Howell* (1915) 84 L.J.K.B. 1399.
(9) *Re a debtor, ex parte The Debtor* v. *National Westminster Bank* [1983] 3 All E.R. 545, 553.

SUPREME COURT.

Cyrus Das (*Mathew Thomas* with him) for the appellant.

D.P. Naban (*M.A. Sreenevasan* with him) for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the court): We allowed the appeal and stated that we would give our reasons. We do so now.

The appeal is against the decision of the learned judge in striking off the creditors' petition. The appellant is the judgment creditor and the respondent the judgment debtor.

On January 23, 1976, the appellant obtained a judgment in the High Court (Civil Suit No. 817 of 1974) against the respondent in the sum of $360,749.46 with costs together with interest at 6% per annum on the sum of $100,000 only. The respondent failed to satisfy the judgment.

On September 24, 1979, by a writ of seizure and sale the appellant applied for leave to levy execution on the respondent's 75,000 ordinary shares in Global Insurance Co. Sdn. Bhd. (formerly known as Sovereign General Insurance Sdn. Bhd.). On January 25, 1980, these shares in the respondent's name were eventually charged and issued to the sheriff to satisfy the judgment. On June 20, 1980, the sheriff obtained an order to sell the said shares by way of private treaty to one of the shareholders, Mr. Tan Kim Wah, at a price of $75,000.00 at $1.00 per share. This sum was paid to the appellant to set off the judgment debt.

On November 20, 1980, a bankruptcy notice was issued and addressed to the respondent at No. 118, Jalan 17/14, Petaling Jaya, Selangor. This was the address given by the respondent himself in his affidavit sworn on August 28, 1974. The particulars of the debt were set out in the said notice. Interest of 6% per annum was based on $360,749.46 when according to the court order it should only be on $100,000.00. This will have to be corrected when the final amount is worked out. As the said notice could not be served on the respondent, substituted service was allowed by advertisement in the national newspapers. Despite this the respondent failed to comply with the said notice. So the appellant took out the creditors' petition. The respondent gave notice of his intention to oppose the said petition. The matter came up for hearing before V.C. George J. on June 5, 1984, when it was adjourned to July 6, 1984 before Abdul Razak J. After hearing the parties, he struck off the said petition with costs. Hence the appeal.

The respondent complained that the notice of sale was not served on him properly and that he

was unable to contest the proceedings. His case is that in the execution proceedings, insufficient credit was given on the value of his shares which were taken by the sheriff in execution. He therefore contended that as the service of the notice of sale was invalid according to Order 43 rule 4(3) of the Rules of the High Court 1957 which was then in force, the bankruptcy notice had become invalid. The learned judge took the view that the notice of sale had not been served according to the rules and that the respondent was not able to contest the selling price or the right to sell or to fetch the highest price to lessen his debt or to enable him, at the eleventh hour, to procure money to settle his debt. He was of the opinion that the bankruptcy notice was presented prematurely before the share price was determined. He was aware that the court had approved the price but thought that it was due to lack of contest by the respondent. In support of this position, the appellant cited *Kamaruddin* v. *United Motor Works Pte. Ltd.*[1] to show that though the notice had not been sent according to the prescribed rules it did not become void but was only an irregularity. The learned judge held that the failure to comply with the rule vitiated the sale.

In the exercise of his jurisdiction in bankruptcy proceedings, the learned judge cannot go behind the judgment. Thus on an application to set aside a bankruptcy notice, it was laid down as early as 1893 that the court could not go behind the judgment. See *In re Easton.*[2] Even if there has been an irregularity in the service of the notice of sale, it is not open to the respondent in this case to challenge the execution proceedings. Under section 3(1)(i) of the Bankruptcy Act 1967, a debtor commits an act of bankruptcy if a creditor has obtained a final judgment for any amount and has served on him a bankruptcy notice requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment. He has seven days after service of the notice to comply with the requirements of the notice or satisfy the court that he has a counterclaim, set-off or cross-demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained. Having regard to these provisions, it was wrong for the learned judge to strike out the creditors' petition.

Further, we do not think it is open to the learned judge in the exercise of his jurisdiction in bankruptcy proceedings to strike out the creditors' petition by disputing the validity of the orders made in earlier execution proceedings when the orders had not been set aside. This is particularly so when there has been no application by the respondent to set aside the execution orders. The two orders were made on January 25, 1980 and June 20, 1980. By an order dated January 25, 1980, the shares in the respondent's name were taken in execution and issued in the sheriff's name. Unless and until this order has been set aside, it is binding and effective. The respondent has not at any time taken any step to have it set aside.

As Lord Diplock, delivering the judgment of the Privy Council, in *Isaacs* v. *Robertson*[3] explained in the following passage at p. 143:

> "Their Lordships would, however, take this opportunity to point out that in relation to orders of a court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are 'void' in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are 'voidable' and may be enforced unless and until they are set aside ...".

After pointing out that in neither of the two Privy Council cases of *Marsh* v. *Marsh*[4] and *MacFoy* v. *United Africa Co. Ltd.*[5] nor in any other case could it be found that any order of a court of unlimited jurisdiction had been held to fall in a category of court orders that could be ignored because they were void *ipso facto* without there being any need for proceedings to have them set aside, he went on to stress:

> "... The contrasting legal concepts of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular, it can be set aside by the court that made it on application to that court; if it is regular, it can only be set aside by an appellate court on appeal if there is one to which an appeal lies."

An irregularity or formal defect in the judgment is no sufficient reason for going behind it: *Re Beauchamp.*[6] As a general principle, the validity of the judgment debt will only be inquired into when there is evidence of fraud or collusion or miscarriage of justice: *Re Flatau;*[7] *Re Howell.*[8]

It is not clear whether the respondent was also making a cross demand or challenging the amount actually owing as counsel for the respondent contended that all orders made previously were null and void. If the respondent was making a cross-demand, he must quantify it. He just could not come to court and said his shares were worth considerably

more. The burden of proof is on the respondent to show by the affidavit or affidavits three things which were stated clearly by Warner J. in *Re a debtor (No. 75N of 1982, Warrington), ex parte The Debtor* v. *National Westminster Bank*[9] as follows:

"... First, the affidavit or affidavits must show that he has a cross-demand against the creditor which is genuine. To satisfy that requirement, the cross-demand must be put forward in good faith and must have a reasonable probability of success, or, as it has also been expressed, must give rise to a triable issue. In the latter respect, there is no hard and fast rule as to the degree of proof required. It depends in each case on the particular facts and circumstances of that case. Second, the affidavit or affidavits must show that the cross-demand could not have been set up in the action in which the judgment relied on by the creditor was obtained. Third, the affidavit or affidavits must show that the cross-demand need not be for a liquidated sum or even for a sum of money at all. But it must be capable of being quantified in terms of money and the affidavit or affidavits must quantify it."

Proviso (ii) to subsection (2) of section 3 reads:

"3(2) A bankruptcy notice under this Act shall be in the prescribed form and shall state the consequences of non-compliance therewith and shall be served in the prescribed manner:

Provided that a bankruptcy notice –

(i) .....

(ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein."

Under proviso (ii), a notice demanding a greater amount would not be liable to be held bad and incapable of amendment.

Williams and Muir Hunter on *The Law and Practice of Bankruptcy,* 19th Ed. at p. 492 under the heading "Formal Defect Not To Invalidate Proceedings", refers to section 147(i) of the English Bankruptcy Act 1914 which is word for word the same as our section 131.

"147(i) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that court."

Where a bankruptcy notice has been served, and not complied with, in respect of a judgment debt which has subsequently been reduced on appeal, that reduction does not retrospectively *per se* cause the notice to become defective or irregular, so as to require the protection of this section.

The respondent gave notice of intention to oppose the petition but made no mention of any irregularity. It is fair to say that if one wants to challenge the validity of a bankruptcy notice, one must give proper notice. We are unable, as the respondent urged us, to say that the bankruptcy notice is irregular and invalid and that the respondent has not committed an act of bankruptcy within the meaning of section 3(1)(c) of the Bankruptcy Act 1967 entitling the petitioning creditors to petition herein.

For reasons given, we allowed the appeal.

Appeal allowed.

Solicitors: *Mathew Thomas & Co.; Skrine & Co.*

HOLIDAY INN, KUALA LUMPUR v. NATIONAL UNION OF HOTEL, BAR AND RESTAURANT WORKERS

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Seah S.C. JJ.) June 17, 1986 & April 4, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 184 of 1984]

Labour Law – Collective agreement – Allegation of failure to comply with agreement – Function of Industrial Court – Industrial Court not entitled to interpret collective agreement – Excess of jurisdiction – Certiorari – Industrial Relations Act 1967, ss. 17, 22, 33 & 56.

Administrative Law – Certiorari – Whether Industrial Court had jurisdiction to make order – Allegation of failure to comply with collective agreement – Whether Industrial Court entitled to interpret agreement – Industrial Relations Act 1967, ss. 23 & 56.

The appellant and the respondent (on behalf of the employees of the appellant) had entered into a collective agreement and this had been given cognizance by the Industrial Court. The collective agreement provided, *inter alia,* for the collection of a 10% service charge on bills and receipts specified in the Service Tax Act 1975. The appellant was to retain 12% and the remaining 88% of the gross amount was to be distributed to employees of the appellant